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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-6038

JAMES EDWARD DROPE,
Petitioner,

vs.

STATE OF MISSOURI,
Respondent.

ON WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS,
ST. LOUIS DISTRICT

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

OPINION BELOW

The opinion of the Missouri Court of Appeals, St. Louis District, affirming the denial by the Circuit Court of the City of St. Louis, Missouri, of the petitioner's motion for post-conviction relief under Missouri Supreme Court Rule 27.26, V.A.M.R., is reported as follows: *James Edward Drope* v. *State of Missouri*, 498 S.W.2d 838 (Mo.Ct.App. at St.L. 1973). The opinion is reprinted in the Appendix at pages 216-225. An appendix to the opinion is reprinted at pages 8-13 of the Appendix.

JURISDICTION

Having been denied transfer of the final judgment entered by the Missouri Court of Appeals, St. Louis District, as reflected in the above opinion, to the Supreme Court of Missouri, the petitioner invokes the jurisdiction of this Court to review the final judgment entered, denying him post-conviction relief, pursuant to 28 U.S.C. § 1257(3) (1970).

QUESTIONS PRESENTED

1. Is the finding that the trial court had not had "reasonable cause to believe" that the petitioner was suffering from "a mental disease or defect excluding fitness to proceed" at the time of petitioner's original trial clearly erroneous?

If it is determined that that finding is not clearly erroneous, the petitioner's contention that his constitutional rights were violated when the trial was continued in his absence presents nothing for this Court to review.

STATUTES INVOLVED

This case involves the Sixth and Fourteenth Amendments to the Constitution of the United States.

The case also involves Sections 552.010, 202.700, 552.020, 552.030 and 559.260 of the Missouri Revised Statutes of 1969.

Also involved is the Missouri Supreme Court Rule 27.26, V.A.M.R.

28 U.S.C. § 1257(3) (1970) is likewise involved, as is 28 U.S.C. § 2254 (1970).

The text of the constitutional provisions, statutes and Missouri Rule involved are set forth in an appendix to this brief.

STATEMENT

On June 25, 1969, the petitioner was convicted of forcible rape in the Circuit Court of the City of St. Louis, Missouri and, on July 21, 1969, it was the judgment and sentence of that court that the petitioner be imprisoned for the remainder of his natural life. The judgment was affirmed on petitioner's appeal to the Supreme Court of Missouri from that conviction. *State* v. *Drope*, 462 S.W.2d 677 (Mo. 1971) (A. 107-118). What is material to the consideration of the questions presented this Court as reflected by the record of petitioner's trial and the ultimate affirmance of the judgment of conviction is outlined below.

On February 20, 1969, as requested by petitioner's trial counsel, Mr. Lester Watson, Joseph S. Shuman, M.D., performed a psychiatric evaluation of the petitioner. That evaluation was reduced to writing in a letter to Mr. Watson from Dr. Shuman dated February 22, 1969, and is reproduced in the Appendix at pages 8-13. It was Dr. Shuman's impression that "abnormal sexual acts" were part of petitioner's "own culture" (A. 12). The doctor did not find "any strong signs of psychosis" but indicated that the petitioner needed "the aid of a psychiatrist" at the time of the evaluation. The doctor offered the following diagnosis: "(1) Psychopathic personality disorder, sexual perversion. (2) Borderline mental deficiency. (3) Chronic anxiety reaction with depression."

On February 26, 1969, an indictment was returned in the Circuit Court for the City of St. Louis, Missouri, charging the petitioner with the rape of his wife (A. 6). On April 14, 1969, the petitioner had the cause continued to May 26, 1969 (A. 1). On May 27, 1969, a copy of Dr. Shuman's letter-report was attached to what was called a "Motion for Continuance" filed by Mr. Watson on behalf of the petitioner seeking to continue the case "until September, 1969 in order that he [the petitioner] might receive an examination, evaluation and psychiatric treatment, as suggested by Dr. Shuman" (A. 7).

On June 23, petitioner's case was assigned to Division No. 19 of the Circuit Court for trial (A. 1). The petitioner, who had been freed on bond, appeared for the trial as required but Mr. Watson did not appear and had to be summoned from the Circuit Court of the County of St. Louis, Missouri (A. 15, 17). From the record established upon Mr. Watson's appearance in court on the afternoon of June 23, 1969, it appears that the petitioner's "Motion for Continuance" had been considered by the assignment judge, the Honorable Casey Walsh, and Mr. Watson was told that the motion was not in proper form and that if Mr. Watson was seriously contending that the petitioner needed psychiatric help, a proper motion should be filed. The record indicates that Mr. Watson was aware that he was to file "an additional form" to invoke the procedures of Section 552.030, RSMo 1969, to obtain a psychiatric examination of the petitioner (A. 16). Seemingly, however, Mr. Watson was confused as to when the case had been reset for trial (A. 15-21).

Mr. Watson objected to going to trial on June 23, 1969 on the grounds that, *inter alia*, "the defendant [petitioner] is not a person of sound mind and should have a further psychiatric examination before the case should be forced to trial" (A. 19).

The testimony of Marianne Joyce Drope, the petitioner's wife, describes in detail how the offense with which the petitioner was charged occurred (A. 22-40). After the rape occurred, she and the petitioner did live together as husband and wife for a time but, as she stated, it was "[b]ecause he was trying to make me—make out he wasn't well . . . and when he went to the psychiatrist and I talked to him, he says it would be best if we would try to get along together, that he thought he would be all right. But he said he would go on and go to work, try to take care of the children. That is what I wanted,—my children taken care of" (A. 41).

Seemingly, Mrs. Drope discussed her husband's case with Mr. Watson on February 12, 1969 (A. 45-46). She agreed with Mr. Watson that it would be best for her to accompany the petitioner to see a psychiatrist. She and her husband went to see Dr. Shuman and the doctor told her that her husband had some problems. She testified that on occasion her husband would roll down a stairway when he didn't get his way or was worried about something (A. 47). During the ten years prior to trial, she had seen him roll down stairs about three or four times at the most (A. 59-60). After rolling down stairs, he would not black out but would get right up, start walking around and say he was all right (A. 61-62). To her knowledge, the petitioner had never had a blackout during the seven years of their marriage (A. 58). During her discussion with Mr. Watson on February 12, 1969, Mrs. Drope executed a written statement to the effect that she believed the petitioner was "suffering from a mental condition" and should receive psychiatric treatment for it (A. 56, 46). On that date she thought it was possible that the petitioner was mentally sick (A. 50). However, asked "Weren't you convinced that he [the petitioner] was sick after talking

to Doctor Shuman?" She replied, "No, sir" (A. 50). Mrs. Drope did not know if petitioner did a lot of drinking but at the time of the rape, he and the others charged with the crime smelled of liquor (A. 62). She had decided to pursue the prosecution of her husband because he had recently tried to choke and kill her (A. 52).

The evidence of the petitioner's physical and nervous condition was admitted by the trial court on the defense proposition that the petitioner was physically incapable of doing the things Mrs. Drope said he did in committing the rape as a result of that condition (A. 51). Mrs. Drope however testified that her husband had not lost any jobs because of his nervous condition to her knowledge (A. 43).

The petitioner was present in court with his counsel, Mr. Watson, throughout the trial proceedings which occurred on June 23 and 24, 1969, but failed to appear for trial on June 25, 1969 (A. 2, 62). The record of what occurred in court on the morning of June 25, 1969, indicates that Mr. Watson moved "for a mistrial in view of the fact that the defendant [the petitioner] . . . shot himself this morning" (A. 63). Mr. Watson complained to the trial court about the difficulty of going to trial without that petitioner and the court replied that that difficulty was brought about by the petitioner who was on bond and had a responsibility to be present. The trial court thus overruled the motion for a mistrial.

At the close of the state's case, the petitioner, through Mr. Watson, moved for a "verdict of acquittal," stating in part:

> "The Court should have declared a mistrial when Defendant [petitioner] moved for same, when it became apparent that the Defendant [petitioner] shot himself and could not further attend the trial as he is confined as a Patient in the City Hospital of St. Louis No. 1, therefore depriving him of being confronted by his accusers as he is being tried in absentia" (A. 64).

The jury returned a verdict finding the petitioner guilty of rape and the trial court assessed the punishment at life imprisonment (A. 65-67). Thereafter, the petitioner, through Mr. Watson, filed his "Motion for a New Trial" (A. 67-69). Ten paragraphs of that motion in some way attack the jury's verdict on the ground that the petitioner was absent during a part of the trial: paragraphs 2, 3, 4, 5, 7, 8, 9, 10, 11 and 12. The petitioner testified at a hearing on his new trial motion before the trial court on September 19, 1969 (A. 71). In essence, his testimony concerned his absence from trial on June 25, 1969. On the morning of that date, he testified that he went to his brother's house, was told by his mother to get a change of clothes and went down into the basement to do so, got the clothes, turned out the light and the next thing he remembered was being in the hospital (A. 72).

> "Q. . . . [By Mr. Watson] Now, Mr. Drope, did you on that date take a gun and deliberately shoot yourself that you know of?
>
> "A. I don't remember a thing. It happened after I turned the light out.
>
> "Q. Did you do anything to prevent you from coming into this courtroom to attend your trial?
>
> "A. No, sir" (A. 73).

After the petitioner's direct examination, the hearing was continued to October 3, 1969. At the continued hearing, the state cross-examined the petitioner who did not recall going to the garage on the morning of June 25, 1969 (A. 77). However he did remember being hit by "something hot" in his stomach. Seemingly he remembered nothing

after that until after coming to in the hospital after he had been operated on.

The state introduced police records to indicate that there was a report made at 8:16 a.m. that the petitioner had shot himself on June 25, 1969 (A. 85). The report was prepared by Patrolman Jerome Dampier (A. 86).

The hospital records of petitioner's admission on June 25, 1969, indicate that he was conscious but nervous and that he made a statement to the doctor that he had shot himself with a .22 caliber in the alley because of some problem with the law (A. 90-91).

Patrolman Jerome Dampier investigated the incident which caused the petitioner to be admitted into the hospital on the morning of June 25, 1969 (A. 94-95). He checked the garage in which the petitioner supposedly shot himself and later talked to the petitioner at the hospital (A. 95-96). At the time Patrolman Dampier talked to him, the petitioner was lying on a stretcher out in the hall of the Emergency Room.

> "Q. (Mr. Frank) Officer, at that time did the defendant [the petitioner] make a statement to you?
>
> "A. Yes, he did.
>
> "Q. What did he say to you?
>
> "A. He said he was supposed to go to court for rape, and he didn't do it; he [would] rather be dead than to go to trial for something he didn't do. So he got his rifle out of his basement and went to the garage and shot himself.
>
> "Q. Did he at any time when he was talking with you mention the word 'blackout', that he couldn't remember how he was shot?
>
> "A. No, sir, he didn't" (A. 97).

Before talking with the petitioner, Patrolman Dampier gained permission to do so from the doctor, was told the petitioner's condition was not critical and that he could be interviewed (A. 97-98).

Thereafter, on October 15, 1969, the trial court overruled petitioner's motion for new trial and filed a memorandum in connection therewith in which it is stated:

> "The court finds from the evidence that the absence of the defendant [petitioner] was due to his own voluntary act in shooting himself; done for the very purpose of avoiding trial . . ." (A. 103).

On his direct appeal to the Supreme Court of Missouri, the petitioner raised two questions which are of importance here. As stated by the Missouri court, those questions were (1) whether "the court erred in proceeding with the trial when he [the petitioner] was absent," and whether "there was 'no evidence upon the record' that he [the petitioner] voluntarily absented himself from the trial" (A. 110; *State* v. *Drope*, *supra*, 462 S.W.2d at 680); and (2) whether "the refusal of the trial court to grant a continuance 'to procure additional psychiatric evaluation' was error" (A. 116; *id.* at 684).

The Missouri Supreme Court decided these issues against the petitioner. At the time of his trial, the petitioner was free on bond and for that reason his absence from trial could be presumed voluntary. That presumption aside, however, the circumstances of the petitioner's absence were presented to the trial court which found from the evidence that the petitioner had voluntarily absented himself and the higher state court gave deference to that finding and conclusion. Thereafter, the Missouri Supreme Court, in essence, found that, as the petitioner had voluntarily absented himself from his trial, it was not

error for the trial court to continue the trial without him. Finding that its conclusion was in accord with the general rule applied by other state and federal courts, the state court stated:

> ". . . [T]he absence of the defendant [petitioner] resulted from an intentional act by him done for the express purpose of preventing his presence at the trial, and we conclude such act constituted a waiver of defendant [petitioner] to his right to be present" (A. 114; *id.* at 682).

Later, the Missouri court addressed the fact that the petitioner was charged with a capital offense:

> "We note that this is a capital case, that the record does not show a waiver of the death penalty, but that capital punishment was not imposed. Some authorities seem to distinguish between a waiver of the right to be present in capital cases and in felony cases generally. . . . However, . . . there is no logical basis for the distinction absent a statute or rule on the matter. The State is interested in all felony prosecutions, and it is as much the duty of the courts in the prosecution of felony cases generally to protect the liberty of accused persons as it is their duty to protect the rights of one accused of a capital offense. . . ." (A. 116; *id.* at 683-684).

After outlining the circumstances concerning the continuance sought by Mr. Watson to obtain a psychiatric evaluation of the petitioner prior to trial, the Missouri Supreme Court stated:

> "In the argument in his brief defendant [the petitioner] seems to base his contention that error resulted in denying the request for a continuance on the basis that additional psychiatric care would take substantial time, and that the time was needed to prepare for trial. There is no contention in the brief that defendant [the petitioner] did not have the mental capacity to proceed with the trial" (A. 117; *id.* at 684).

The state appellate court then ruled that the record before it did not demonstrate an abuse of discretion in refusing to grant the continuance.

On April 22, 1971, the petitioner filed a motion pursuant to Missouri Supreme Court Rule 27.26 [hereinafter referred to as Rule 27.26] to vacate his judgment and sentence in the Circuit Court of the City of St. Louis, Missouri (A. 4). As required by the rule, the motion was filed in the sentencing court. A hearing on the motion took place on July 21, 1971. On June 26, 1972, the motion was overruled. The petitioner appealed to the Missouri Court of Appeals, St. Louis District, on July 7, 1972. On March 5, 1973, petitioner's cause was argued and submitted to that court (A. 5). On June 5, 1973, the Missouri Court of Appeals, St. Louis District, filed an opinion upholding the overruling of appellant's Rule 27.26 motion. Subsequently, the petitioner timely took the appropriate procedural steps to have the cause reheard or transferred to the Supreme Court of Missouri but to no avail. It is the respondent's position that very little of the evidence elicited at the Rule 27.26 hearing illuminates, clarifies or is material to the questions presented this Court. However, the respondent will outline below the evidence adduced at the hearing which will contribute to the discussion contained in the argument portion of this brief. Also outlined below are the findings and conclusions of the sentencing court and the Missouri Court of Appeals, St. Louis District.

The petitioner's first witness at the Rule 27.26 hearing was Joseph F. Shuman, who qualified himself as an

expert in psychiatry (A. 128-129). He had examined the petitioner approximately four months prior to the original trial, on February 20, 1969, for about an hour and a half and had made a written letter-report of that examination which is contained in the Appendix at pages 8-13. The witness, a medical doctor, agreed with petitioner's counsel that "psychiatrically well persons never or rarely make suicide attempts" (A. 132). The petitioner also elicited the following testimony:

> "Q. Doctor, based upon your knowledge in the field of psychiatry, your educational and practical background, do you have an opinion as to whether or not a person who attempts a suicide, whether or not that act of attempted suicide would be reasonable cause to believe one might not be mentally competent at that time to understand, say, the proceedings around him, if he was in the midst of a trial?
>
> "A. This is a possibility.
>
> . . .
>
> "Q. I am asking, is there reasonable cause to believe that though?
>
> "A. There is reasonable cause" (A. 133-134).

On cross-examination, the doctor was asked a question which hypothesized the factual situation involved in the petitioner's case, and which asked him if in such a situation a man in the petitioner's position could deliberately, willfully and voluntarily shoot himself to get his trial continued (A. 134). The doctor replied that it was "certainly a possibility." On February 20, 1969, at the time the doctor made his examination of the petitioner, he found the petitioner to be free from psychosis (A. 134). Although the petitioner was not very responsive and was very nervous, the doctor found him to be fairly cooperative and

able to answer judgment questions without any trouble (A. 134-135). The report written by the doctor leaves the impression, which the doctor felt was certainly true, that the petitioner's anxiety was intensified because of the legal proceedings against him (A. 136). The doctor's report does not indicate that the petitioner was unable to understand court proceedings or to aid and assist his counsel (A. 136-137).

On re-direct examination, the doctor indicated that as a psychiatrist, given the facts surrounding the petitioner's case, he would have had reasonable cause to believe that the petitioner was mentally incapable of proceeding at the time the petitioner shot himself in the stomach (A. 138). The following testimony was also elicited:

> "Q. One of your conclusions was that he [the petitioner] had a chronic anxiety reaction with depression. Could you explain a little bit about what that means?
>
> "A. That means the patient is markedly anxious and intense, not for one day but for a long period.
>
> "Q. Psychiatrically speaking, a man in this condition, could his judgment be impaired in any way, could his reason be impaired?
>
> "A. His reason I feel would be impaired. Are judgment and reason synonymous?
>
> "Q. Only if you think they are.
>
> "A. I think his judgment would certainly be affected by his condition. I guess that would be slightly impaired, but not completely impaired" (A. 139).

Norma Snowden, the next witness, was used to introduce records of the petitioner's admission into the hospital on June 25, 1969. The records indicate that the petitioner signed a consent to operation form (A. 148).

The next witness, Dr. Jon Tek Lum, was a psychiatrist who was familiar with Chapter 552 of the Missouri statutes (A. 149-151). Under questioning, the doctor gave the following opinion on the situation which occurred at petitioner's trial:

> "A. I feel that a man that has committed an act such as raping his own wife, or allegedly raping his own wife, and then afterwards during the trial, in the process of the trial, makes a suicide attempt is in need of at least a psychiatric evaluation to find out his mental condition" (A. 151).

On cross-examination, the doctor stated that in his opinion the petitioner had made a suicide attempt by shooting himself (A. 155). Of the people who make suicide attempts, eighty-five percent of them have, for example, a chronic depressive illness or suffer from alcoholism (A. 159). The remaining fifteen percent suffer from character disorders, schizophrenia or organic brain problems. If a person deliberately shot himself not to commit suicide but to achieve any other result, the doctor would say that that person had a psychiatric problem (A. 160).

The petitioner also introduced the testimony of his half-brother, Homer Elmer Case, Jr., and his ex-stepfather, James McCleary. None of this testimony seems relevant to the questions presented this Court.

The petitioner also testified in his own behalf (A. 178). Much of the petitioner's testimony is directed to the issue of whether he was rendered the effective assistance of counsel by Mr. Watson, an issue he has abandoned in this Court. Nevertheless, the testimony does illuminate to some extent the petitioner's capacity to understand the proceedings against him and to assist in his own defense and, therefore, is summarized below. Mr. Watson was

retained to represent the petitioner by the petitioner's mother (A. 179). Watson talked with the petitioner's wife and arranged for the examination made by Dr. Shuman (A. 180). The petitioner indicated that Mr. Watson only talked vaguely with him about the facts and circumstances of the alleged offense (A. 181). At some point either prior to trial or during trial, the petitioner's attorney, the prosecuting attorney and the trial judge went into chambers for a conference (A. 182). When Mr. Watson came out of the conference, he advised the petitioner to plead guilty and take a ten-year sentence. The petitioner at that time replied that he was not guilty and could prove it, that he would have his witnesses ready for his defense, and told Watson just to make sure that the witnesses were put on the stand. Watson told the petitioner to be sure and have the witnesses ready for trial and the petitioner assured Watson that he would. At the time of the trial, the petitioner was taking some medication (tranquilizers) he had received from Dr. Shuman because he was so nervous and because he could not make sense out of what was occurring in the courtroom (A. 183).

The sentencing court filed its "Statement of Facts, Conclusions of Law and Order" overruling the petitioner's Rule 27.26 motion on June 26, 1972 (A. 197-213). As required by Rule 27.26, the sentencing court found it was precluded from considering the issue of whether it was constitutional error to proceed with trial in the absence of the petitioner (A. 200). The court noted that at no time—prior to, during or after trial or on appeal—had the petitioner raised the contention that he was mentally incapable of proceeding with trial. Dr. Shuman's report indicated that the petitioner was "well oriented in all spheres," able to answer judgment questions without trouble, showed no strong signs of psychosis, and had a culture of sexual

perversion, all of which failed to indicate that the petitioner could not understand the proceedings against him or was incapable of cooperating with counsel (A. 200-201). Although petitioner's trial counsel contended that the petitioner was not of sound mind and should undergo psychiatric evaluation, counsel made no statement and in no way contended that the petitioner was mentally unfit to proceed.

There was no evidence brought out during the course of the trial upon which a lay person could conclude that the petitioner was unable to understand the proceedings against him or assist his counsel. Nor had the petitioner acted in any way during his attendance at trial to cause one to reach such a conclusion. No previous conduct or history of mental illness was brought to the court's attention at trial.

Mr. Watson, the petitioner's trial counsel, seemed familiar with the provisions of Chapter 552 of the Missouri statutes and was apparently satisfied that the petitioner had no viable defense under that chapter (A. 202).

> "The mere fact that he [Mr. Watson] stated that his client [the petitioner] was mentally sick is no evidence that Mr. Drope was mentally sick. It has been the experience of the trial courts here that motions for psychiatric examinations have often been made merely for the purpose of delay. It is estimated that almost seventy-five percent of those sent for psychiatric examinations are returned mentally competent" (A. 202).

The sentencing court considered the testimony of the two psychiatrists at the hearing on petitioner's motion under Rule 27.26 and found that Dr. Shuman's was "speculative and based merely on possibilities" and that Dr. Lum's merely indicated that a person who attempted suicide should be evaluated psychiatrically to determine why he did it (A. 203).

The sentencing court found that there was no evidence to indicate that the petitioner was incapable of cooperating with his trial counsel and no credible evidence to suggest he could not understand the proceedings (A. 208).

The court noted that the petitioner did not testify at the Rule 27.26 hearing that he had attempted to commit suicide. The petitioner's testimony that he did not know how he came by his bullet wound on June 25, 1969 was found unbelievable by the court. It added:

> "The fact that Mr. Drope shot himself to avoid trial suggests very strongly an awareness of what was going on. He had heard his wife testify to the facts of the crime and had heard two witnesses testify to his admissions and hence was very much aware of, not only the proceedings, but what he had done and the probable consequences. A person does not defend himself against that which he is not aware of or does not know of. His shooting himself was to avoid the consequences" (A. 208-209).

The opinion of the Missouri Court of Appeals, St. Louis District, upholding the sentencing court's determination on petitioner's motion under Rule 27.26 was filed on June 5, 1973. That court found that the two questions presented this Court were "inextricably woven together" (A. 218; *Drope* v. *State, supra*, 498 S.W.2d at 841).

After analyzing the factual circumstances and the constitutional concepts and Missouri statutes involved, the appellate court felt that it had to determine whether the petitioner's rights concerning his mental competency to

stand trial were violated "at three different times—before the trial, during the trial after the suicide attempt, and at the time of the motion for new trial" (A. 220; *id.* at 842). Only Dr. Shuman's report was before the trial court prior to trial. That report was analyzed in detail by the state appellate court and was found not to raise "a reasonable doubt of Drope's fitness to proceed" (A. 220-221; *id.*).

With regard to the second time period under consideration—during trial—the St. Louis appellate court, after considering the practicalities of the situation, stated:

> "We therefore hold that it was within the discretion of the trial court, if he became aware of doubts of competency during the trial, to delay ordering *sua sponte* an examination and hearing until the close of the case" (A. 221-222; *id.*).

With regard to the third time period—after the trial was over but prior to sentencing—the appellate court assumed that the petitioner's act of shooting himself was "in fact a bona fide attempt at suicide," accepted that that act to Dr. Shuman and Dr. Lum "would raise a reasonable doubt as to a man's competency to proceed with trial," but noted that the two doctors did not state that such an intent "established incompetency to proceed but only raised in their expert opinion a doubt," and stated:

> "At the time judgment was finally entered and sentence imposed against Drope, the court had before it the pre-trial psychiatric report and the fact of an attempted suicide, and evidence that that attempt was to avoid trial. We are unable to conclude that as a matter of law an attempt at suicide creates a reasonable doubt as to the movant's competency to stand trial. . . and the expert medical opinion of psychiatrists of such doubt cannot be imputed to a trial judge where such expert opinion is not before him. The procedures employed for protecting Drope's rights were not shown by movant to be inadequate. We cannot hold the finding of the trial court regarding defendant's [petitioner's] competency to be clearly erroneous" (A. 222-223; *id.* at 843).

The second question now raised by the petitioner before this Court was also presented to the Missouri Court of Appeals, St. Louis District, as the petitioner there alleged that he was denied due process when his trial continued in his absence (A. 216; *id.* at 839-840). The St. Louis appellate court noted that the Supreme Court of Missouri had determined on petitioner's direct appeal that his act of shooting himself was a voluntary act, done for the purpose of avoiding trial and thus constituted a waiver of his right of confrontation (A. 223; *id.* at 843). As to the petitioner's contention that his absence from trial was a result of his mental problem, it should be recalled that the appellate court had previously emphasized that the two psychiatrists had not testified that an attempt at suicide would establish incompetency to proceed but only raise a doubt of incompetency in their expert opinion. The court added:

> "The psychiatric testimony at the 27.26 proceeding that such an attempt [at suicide] might have been the product of a lack of competency does not meet the burden of proof placed upon movant [under Rule 27.26]. Again we cannot hold the trial court's finding to be clearly erroneous" (A. 223; *id.* at 843).

SUMMARY OF ARGUMENT

The Missouri Court of Appeals, St. Louis District, correctly applied the doctrine delineated by this Court in

Pate v. *Robinson*, 393 U.S. 375 (1966) as the determination by the sentencing court on the petitioner's motion under Missouri Supreme Court Rule 27.26 that the facts and evidence in this case did not provide the trial court with reasonable cause to believe that the petitioner was suffering from a mental disease or defect excluding fitness to proceed at any time before or during the course of petitioner's trial or prior to announcing judgment and sentence so as to require the trial court to cause the petitioner to undergo psychiatric examination and, if the results thereof were contested, to hold a competency hearing pursuant to Missouri law is not clearly erroneous. Furthermore, the petitioner's act of shooting himself in the stomach between the second and third days of trial under the evidence in this case was a voluntary one, done for the specific purpose of avoiding being present at trial and was insufficient in and of itself to require a *Pate*-dictated competency hearing or the Missouri equivalent.

The constitutionality of continuing the petitioner's trial in his absence after he had shot himself and caused his hospitalization was determined, adversely to the petitioner's position, by the Supreme Court of Missouri on his direct appeal and was not a question open to the Missouri Court of Appeals, St. Louis District and, hence, is not before this Court. The only issue open to the Missouri Court of Appeals, St. Louis District, in connection with the above question was whether the petitioner's absence from trial was involuntary in that shooting was the result of mental incompetency and that issue was correctly decided by the state appellate court when it held that the finding of the sentencing court that the petitioner had not proved his absence was the product of mental incompetency is not clearly erroneous.

ARGUMENT

I.

The Finding That the Facts, Circumstances and Evidence In This Case Did Not Raise a Bona Fide Doubt of the Petitioner's Competency to Stand Trial So As to Require the Trial Court to Sua Sponte Convene a Competency Hearing Is Not Clearly Erroneous.

The respondent, the State of Missouri, concedes the conviction of a legal incompetent violates both federal and state concepts of due process and that its procedures must be sufficient to protect against the violation of those concepts. An accused must be able to both factually and rationally understand the proceedings against him and "to consult with his lawyer with a reasonable degree of rational understanding" before he is required to withstand the rigors of a criminal prosecution. *Dusky* v. *United States*, 362 U.S. 402 (1960). Or, to otherwise phrase the rule as the Missouri legislature chose to do, it can be said:

> "No person who as a result of mental disease or defect lacks capacity to understand the proceedings against him or to assist in his own defense shall be tried, convicted or sentenced for the commission of an offense so long as the incapacity endures."

Section 552.020 (1), RSMo 1969. Whenever a *bona fide* doubt is raised that an accused lacks the rational abilities of the *Dusky* rule, the court must, on motion or *sua sponte*, convene a competency hearing to determine whether the accused is capable of standing trial. *Pate* v. *Robinson*, *supra*. The *Pate* rule is codified in Missouri where "*bona fide* doubt" is translated into "reasonable cause." Section 552.020 (2), RSMo 1969. Undoubtedly,

there is nothing of constitutional significance lost in the translation. *See Miller* v. *State*, 498 S.W.2d 79, 83 n. 1 (Mo.Ct.App. at K.C. 1973).

The term "mental disease or defect" is one of art and a Missouri statute provides an open-ended definition of it. Section 552.010, RSMo 1969. However, an abnormality manifested only by "antisocial conduct" or "criminal sexual psychopathy" is not included within the term. The petitioner does not contend that Missouri's statutory scheme, including whatever restrictions brought about by the definition of "mental disease or defect," was or is inadequate to protect his due process rights.

In a motion under Rule 27.26, the petitioner put to issue whether, at any time during the course of the proceedings at his trial, the court should have had "reasonable cause" to believe that he was suffering from a "mental disease or defect" excluding fitness to proceed so as to require the court under Section 552.020 to cause the petitioner to be psychiatrically examined and, if the findings of the examination were contested, hold a hearing on his mental fitness to stand trial. Under the terms of that rule, the petitioner had the burden of convincing the sentencing court on the issue by the preponderance of the evidence and the Missouri Court of Appeals, St. Louis District, the court to which this Court's writ of *certiorari* is taken could not overturn the findings of the sentencing court on the issue unless it was able to declare that finding "clearly erroneous." Rule 27.26 was specifically designed by the Supreme Court of Missouri to provide a valuable post-conviction remedy and not to provide another direct appeal where the state's burden is considerably greater. If the rule is to retain that position and the state-federal relationship is to remain in proper balance, this Court must

accept the limitations placed on proceedings under the rule in considering this writ.

The question of whether the sentencing court considering the Rule 27.26 motion committed clear error with regard to the *Pate* issue is essentially one of fact and the weight to be given certain facts. What the court at petitioner's trial had before it, relevant to this issue, was (1) Dr. Shuman's letter-report, (2) the actions of Mr. Watson, (3) Mrs. Drope's testimony and (4) the petitioner's act of shooting himself.

There is nothing in Dr. Shuman's report to indicate to the trial court that the petitioner was incapable of understanding the proceedings against him or assisting in his own defense. The petitioner was "well oriented in all spheres," could answer judgment questions *"without trouble,"* displayed no psychosis, possessed a culture which included "abnormal sexual acts" (A. 8-13). The diagnosis of the doctor contained in the report was correctly analyzed with reference to Chapter 552, RSMo 1969, the adequacy of which is not at issue, by the Missouri Court of Appeals, St. Louis District:

> "The conclusions [of Dr. Shuman] are that Drope is (1) sociopathic—a synonym for anti-social which is specifically exempted as a mental disease or defect under Missouri law; (2) sexually perverted—again exempted; (3) borderline mental deficiency—but no indication it is severe enough to prevent cooperation and understanding, and the report indicates the contrary is true; (4) chronic anxiety reaction with depression—treated by the doctor with tranquilizers and again indicated as not interfering with Drope's understanding or cooperation and explained as based in part on his legal troubles" (A. 220; *Drope* v. *State, supra*, 498 S.W.2d at 842).

Although Dr. Shuman did not provide an opinion in his report as to whether the petitioner was capable of standing trial, when Missouri law is correctly applied, his report would have supported an opinion in the affirmative. Therefore, even though Dr. Shuman indicated that the petitioner was in need of the aid of a psychiatrist, he seemingly did so on a diagnosis which fails to provide any basis for doubting the petitioner's capability to cooperate in and understand legal proceedings.

Under all the facts and circumstances, it is clear that Mr. Watson, the petitioner's trial counsel, did not seriously and sincerely believe that his client lacked the mental capacity to assist in defense of the rape charge or to comprehend what was occurring at trial. Beyond obtaining the report from Dr. Shuman, filing a "Motion for Continuance" and arguing against going to trial because of that motion, and eliciting testimony from Mrs. Drope concerning her husband's "nervous condition" for the purpose of demonstrating that he was physically incapable of committing the acts of which she complained, Mr. Watson did nothing to advance a theory that the petitioner was suffering from a "mental disease or defect" excluding responsibility and, at no time, did he contend that the petitioner was suffering from a "mental disease or defect" excluding fitness to proceed. Specifically, on no occasion did he confront the trial court with a complaint as to the cooperation he was receiving from his client or as to his client's ability to understand and assist. The now much vaunted motion was on its face nothing more than an attempt by Mr. Watson to delay the trial. The alleged need of psychiatric evaluation and treatment was no more than a ground on which to base the motion. Moreover, the sentencing court's experience was that Chapter 552 motions were often merely designed to delay the trial (A. 202). The letter-report

from Dr. Shuman to Mr. Watson was dated February 22, 1969 but Mr. Watson did not file his motion until some three months later, on May 27, 1969. At that time, he subsequently admitted, it was pointed out to him and he agreed that the motion was ineffective to invoke the procedures of Section 552.030, RSMo 1969, if it was his intent, whic hit apparently was, to raise a plea of not guilty by reason of "mental disease or defect" excluding responsibility. Yet, at the time the case was assigned out for trial, on June 23, 1969, he had failed to remedy the defect. It is fair to assume, as the sentencing court did (A. 202), that it was clear to Mr. Watson, based upon Dr. Shuman's report and his own observations, that the petitioner did not have a viable defense under Chapter 552 and for that reason Mr. Watson made no effort to cause the petitioner to undergo a psychiatric examination pursuant to Section 552.030. After learning that the petitioner had shot himself, Mr. Watson did not raise the issue of his client's mental competency, and that issue was not raised as a basis for overturning the petitioner's conviction on the direct appeal to the Supreme Court of Missouri. In sum, the actions Mr. Watson took with regard to raising his client's mental competency reveal that he was not sincere in raising the issue but only wished to delay the trial and did not seriously contend that the petitioner was in any way incapable of standing trial. In determining an accused's competency, the trial courts of Missouri, and undoubtedly those of the other states as well as the federal system, must rely on the sincere opinions of trial counsel. *Miller* v. *State, supra*. In light of all that occurred, however, Mr. Watson's exhortation that the petitioner was "not a person of sound mind and should have a further psychiatric examination" while it might otherwise be of some significance is totally empty and devoid of meaning on the *Pate* question presented this Court.

Mrs. Drope's testimony completely fails to support the contention that the trial court should have conducted a *Pate* competency hearing or acted pursuant to Section 552.020 (2). She wanted to make the best of the situation and to do what was best for her children. The thrust of her testimony makes it clear that it was Mr. Watson who suggested to her the possibility that her husband was in need of psychiatric help (A. 46). For that reason, she agreed to see Dr. Shuman but after talking with the doctor she was not convinced the petitioner was sick (A. 50). At most three or four times during the eight to ten years she had known the petitioner at the time of trial, he had rolled down a short flight of stairs (A. 59-60). He would do so, she explained, when he did not "get his way or [was] worried about something" (A. 47). As stated by the Missouri Court of Appeals, St. Louis District, those "episodes demonstrate pique more than anything" (A. 221; *Drope* v. *State*, *supra*, 498 S.W.2d at 842). When considered *in toto* there is nothing in her testimony that amounts to evidence of any sort that the petitioner was unable to assist defense counsel or understand the proceedings against him.

The petitioner's act of shooting himself is said to be evidence of his mental incompetency which should have caused the trial court to take the appropriate actions under Section 552.020 (2) consistent with the *Pate* doctrine. The petitioner continues to characterize his act of self-mutilation as an attempted suicide. There is substantial, although mostly circumstantial, evidence which indicates that the petitioner did not actually intend to take his own life and staged the act so as to be confident that he would not in fact die from the self-inflicted wound. Apparently he shot himself with a small caliber (.22) weapon in a non-vital part of the body at a time when help was

readily available. At hospital, while being interviewed by a police officer, the petitioner stated that his intention in shooting himself was to avoid going to trial. Under these circumstances, it is hardly fair to say that the petitioner tried to kill himself. At any rate, it is clear from the evidence adduced at the hearing on the motion for new trial that on the morning of June 25, 1969, the trial court knew that the petitioner had shot himself and was in hospital and had received information that he had made a statement to the effect that he had shot himself to avoid going to trial (A. 63, 97-100, 102-103). There was nothing before the trial court to suggest that the mental state of the petitioner which permitted him to discharge a firearm in his stomach to avoid attending trial would also prevent him from assisting his counsel and understanding the trial proceedings. The petitioner's testimony on the motion for new trial to the effect that he did not remember anything about the shooting (A. 73) is refuted by the testimony of the police officer (A. 97) and by the hospital records (A. 90) and was found by the trial court to be unbelievable (A. 103). Clearly, under the facts and circumstances, the petitioner did not want to go to court on June 25, 1969. If he had manifested that desire by stepping in front of a ten-ton truck, there might have been a basis for doubting his competency. But he chose to fulfill his desire by a means that was clearly calculated to achieve the result sought without, insofar as can be determined from the record before this Court, exposing himself to serious or permanent injury. Under these circumstances and the others in the case, it can hardly be said that the petitioner's act of shooting himself was evidence of mental incompetency calling for the trial court to act under Section 552.020 (2).

In the context of the *Pate* problem in this case, the opinions of Dr. Shuman and Dr. Lum in the record before

the Court are meaningless. Those opinions were not before the trial court for consideration at the time of trial so as to raise any question as to whether there was "reasonable cause" to believe the petitioner was suffering from a "mental disease or defect" excluding fitness to proceed. Moreover, those opinions were advanced by the two doctors as experts in the field of psychiatry, a degree of expertise to which no trial judge should be held, and were obviously formulated in response to the values of that field with no regard to what is legally practical or to a smoothly functioning legal procedure.

With the above analysis, the respondent believes that it has covered the ten "developments" listed by the petitioner on pages 25-26 of his brief. However, the responsive petition as to each "development" is summarized below.

(1) That the petitioner was charged with raping his wife and the facts of the offense lose all importance under the circumstances of this case and in light of Missouri law. On January 17, 1969, the evidence was that the petitioner smelled of liquor (A. 62) which to some extent could account for his aberrant behavior. In fact, according to Dr. Shuman's report, the petitioner had been drinking in excess of eight hours, and his friends for some time, before the rape was committed (A. 8). His culture included "abnormal sexual acts" (A. 12) and his wife admitted that he had performed certain types of those acts on her during their relationship (A. 11). Abnormal sexual conduct alone is not encompassed by the term "mental disease or defect." Section 552.010.

(2) That Mr. Watson caused the petitioner to be interviewed by Dr. Shuman evinces nothing other than that Mr. Watson was taking the necessary steps to explore the defenses open to the petitioner. The doctor's report, as argued, provides no basis for a Chapter 552 defense.

(3) It seems clear from her testimony that Mr. Watson suggested to Mrs. Drope that her husband was in need of psychiatric aid so that she would accompany him to see Dr. Shuman (A. 46). She actually signed the statement that she did not want to prosecute her husband not because she thought he was mentally ill and in need of psychiatric treatment but because she wanted him to take care of her children (A. 41). After talking with the doctor, she was not convinced that her husband was mentally sick (A. 50).

(4) Dr. Shuman's report, the next development listed by the petitioner on page 25 of his brief, has already been discussed in considerable detail. Suffice it to say that the respondent's position is that the report does not suggest that the petitioner was mentally incompetent to stand trial under Missouri law but in fact suggests the opposite. As stated in *Miller* v. *State, supra,* 498 S.W.2d at 85:

> "The suspicion or actual presence of some degree of mental illness or need for psychiatric treatment does not equate with incompetency to stand trial [Butler v. United States, 384 F.2d 522, 523 [1-3] (8th Cir. 1967)] and does not require the *sua sponte* hearing under Pate v. Robinson, *supra,* if the accused is not hindered in understanding the proceedings or in assisting counsel. United States v. Kaufman, 393 F.2d 172, 176 (7th Cir. 1968)...."

(5) Mr. Watson did not file his motion for over three months after the date Dr. Shuman made his report and the evidence, which has been discussed in detail, is fairly conclusive that the actual purpose of the motion was to cause a delay in the trial. The motion clearly did not call for a determination of the petitioner's competency to stand trial.

(6) It is the practice of the St. Louis Circuit Attorney to not oppose any motion which seeks a psychiatric examination regardless of the motion's merit or lack thereof (A. 206).

(7) The actions of Mr. Watson in raising, or failing to raise, the mental competency of his client also have been covered completely. The petitioner's characterization of Mr. Watson's advocacy on that issue as "fervent" and "vigorous" is not justified by the record, but quite the contrary as previously noted.

(8) Mrs. Drope said that at most her husband had rolled down stairs, indicating it would be a short flight of stairs, three or four times because he was worried or failed to get what he wanted (A. 47, 59-60). She had related that information to Dr. Shuman and the report indicates she told him that her husband rolled down stairs to gain her sympathy (A. 120). Regardless of why the petitioner behaved as he did, Dr. Shuman considered that information in making his report and that report was before the trial court.

(9) It is an exaggeration to say that Mr. Watson continually raised the question of the petitioner's mental competency in cross-examining Mrs. Drope. He did not do so any more than has already been indicated in this brief and, to some extent it would seem, to develop his theory that the petitioner was physically incapable of committing the crime charged (A. 51). If it was her opinion on the question he sought, she apparently gave it by remaining unconvinced that her husband was mentally sick (A. 50) even after Dr. Shuman had told her the petitioner had some problems (A. 46).

(10) There is no evidence in the record before this Court whatsoever that the petitioner attempted to kill

himself when he shot himself in the stomach on the morning of June 25, 1969. Apparently the shooting occurred around 8:15 a.m. (A. 85). The petitioner was admitted to the hospital at 8:35 a.m. (A. 146) and was conscious at that time and made a statement to the admitting doctor that he had shot himself because of some problem with the law (A. 90-91). The petitioner was interviewed at the hospital by the police officer at some time before 9:00 or 9:15 a.m. (A. 98). Before the interview, the officer had learned that the petitioner was not in critical condition (A. 97-98). At the time of the interview, the petitioner was conscious and his speech was clear and coherent (A. 96). The petitioner made a statement to the police officer to the effect that he had shot himself to keep from going to trial (A. 97). Under all the facts and circumstances, the petitioner did not choose to commit or attempt suicide but chose to shoot himself with a small caliber weapon in a non-vital spot when immediate medical attention was assured for the express purpose of avoiding attending trial. The act committed by the petitioner is not evidence under the relevant facts and circumstances that he was mentally incompetent to stand trial.

The petitioner also advances the theory that an act of attempted suicide in itself should be sufficient to invoke the procedural protections of the *Pate* doctrine and Section 552.020 (2). Even if that theory were to find this Court's approval in the abstract, there is no basis for applying it in this case as there is nothing in the record before this Court to indicate that the petitioner attempted to destroy himself but, rather, the record is replete with evidence that he had no intention to achieve that result and acted so as to avoid that result. The theory is fatuous however unless it is modified by the requirement that there be some evidence in the record to raise a *bona fide*

doubt to the effect that the act of attempted suicide was brought about by a mental condition and that same condition could hinder assisting counsel or understanding the proceedings. *See United States* v. *Marshall*, 458 F.2d 446 (2d Cir. 1972); *Daugherty* v. *Beto*, 388 F.2d 810 (5th Cir. 1967). There is nothing in the record before this Court to suggest that the petitioner's act of shooting himself was the result of a mental condition which adversely affected his capability of assisting his counsel or understanding the trial.

The reasons which cause people to attempt suicide are varied and only a small percentage of those reasons amount to mental incompetency in the legal sense (A. 159). The petitioner's suggested rule which makes "attempted suicide" synonymous with *Pate's "bona fide* doubt" or Missouri's "reasonable cause" is obviously unworkable and would serve only to switch the legal focus from a consideration of a mental condition which may have precipitated the act to a determination of whether the act was really committed for the purpose of self-destruction.

Finally, the way in which this case is distinguished from the *Pate* case is evident and was adequately summarized by the Missouri Court of Appeals, St. Louis District (A. 219, 222; *Drope* v. *State, supra*, 498 S.W.2d 841, 843). The respondent does not believe it is necessary to draw any further distinctions.

The finding of the sentencing court, affirmed as not clearly erroneous by the Missouri Court of Appeals, St. Louis District, that the facts, circumstances and evidence in this case did not require the trial court to hold a *Pate* competency hearing or the Missouri equivalent is not clearly erroneous and this Court should therefore affirm that finding.

II.

The Constitutionality of Continuing the Petitioner's Trial in His Absence, Except As to Whether His Absence Was Caused by Mental Incompetency, Is Not Properly Before This Court and the Finding That the Petitioner Had Not Satisfied His Burden of Proof with Regard to the Exception Is Not Clearly Erroneous.

On the direct appeal of his conviction to the Supreme Court of Missouri, the petitioner litigated the question of whether he was denied due process or his Sixth Amendment rights when his trial was continued without him after he shot himself to avoid standing trial and the highest court of this state determined that there was no constitutional deprivation, under the circumstances, in receiving evidence, instructing the jury, hearing the arguments of counsel and accepting the jury's verdict in the petitioner's absence (A. 110-116; *State* v. *Drope, supra*, 462 S.W.2d at 680-684). This Court's writ does not extend to the Supreme Court of Missouri nor to that determination. This Court is without a jurisdictional basis for considering the merits of that determination. *Cf.* 28 U.S.C. § 1257 (3) (1970).

The only aspect of the question of whether the petitioner was denied his constitutional rights when the trial continued without his presence open to the Court to which the writ of *certiorari* is taken, the Missouri Court of Appeals, St. Louis District, and apparently litigated by the petitioner was whether his absence was involuntary in that it was due to mental incompetency (A. 223; *Drope* v. *State, supra*, 498 S.W.2d at 843). The petitioner, it is evident, from the record, actually made no attempt to litigate the question of his mental competency and the only evidence introduced at the hearing on his Rule 27.26 motion which is in any way relevant to that question was the testimony

of Dr. Shuman and Dr. Lum. The petitioner seemingly does not contend that their testimony was sufficient to establish that he was mentally incompetent at the time he shot himself or at any other time but, if so, he clearly did not meet his burden of proof under Rule 27.26. Consequently, the Missouri Court of Appeals, St. Louis District, was correct in holding that the finding that the petitioner had not established a basis for relief on the contention that his absence was involuntary in that it resulted from mental incompetency is not clearly erroneous (A. 223; *id.*).

As previously argued under Point I of this brief, this Court should accept the limitations of a Rule 27.26 proceeding in considering this writ. The argument made in that regard previously is reasserted here *in toto*. The entire thrust of Point II of the petitioner's brief is to relitigate the question decided by the Supreme Court of Missouri on direct appeal. That question was *res judicata* to the Missouri Court of Appeals, St. Louis District, and so should it be to this Court on this writ. Rule 27.26 is not designed to provide a second appeal.

Obviously, the constitutionality of continuing the trial in the petitioner's absence is not *res judicata* to a federal district court having *habeas* jurisdiction. *Townsend* v. *Sain*, 372 U.S. 293 (1963). In his brief, the petitioner vehemently argues that the state court determination that he voluntarily absented himself from trial is meaningless. If that is true, which the respondent does not believe, this court is provided no basis for taking remedial action as it is not known what action is warranted. Under the holding in *Townsend* v. *Sain*, *id.* at 313, and pursuant to 28 U.S.C. § 2254 (1970), a federal district court in *habeas* could determine what remedy, if any, is warranted. Clearly, this Court should require the petitioner to pursue any state remedies he has thus far failed to exhaust with regard to

the second question presented and proceed from there to invoke his federal *habeas* remedy.

Parenthetically, the respondent will state that it does not believe the petitioner has exhausted his state remedies on the question of whether his absence from trial was caused by mental competency. As previously indicated, the petitioner made no meaningful attempt to litigate that issue in his Rule 27.26 motion and, of course, his mental competency was not put to issue at trial.

In determining that there was no constitutional infringement in proceeding with the trial in the petitioner's absence, the Supreme Court of Missouri gave full consideration to the fact that the petitioner was charged with a capital offense (A. 116; *State* v. *Drope*, *supra*, 462 S.W.2d at 683-684). Therefore, as analyzed above, that issue is also foreclosed to this Court on this writ. However, the state court correctly determined that the petitioner was charged with a capital offense is of no moment or constitutional significance. In this case, although the petitioner was charged with an offense which was, at that time, punishable by death, he was free on bond. The dicta in *Diaz* v. *United States*, 223 U.S. 442, 445 (1912) to the effect that one charged with a capital crime may not waive his right to be present at trial, upon which the petitioner so heavily relies, clearly is based on the assumption that one accused of a capital offense is in custody and not free on bond. *See id.* at 456-460 and cases cited therein. Although the cases which follow the dicta in *Diaz* perpetuate the "rule" that one accused of a capital offense may not waive his right to be present at trial, without considering whether the accused is in custody or free on bond, that rule is illusory and never implemented in practice. The rule which is implemented is that one accused of a capital offense who remains in custody so that his presence at trial is subject

to the whim of his custodian may not waive his right to be present at every stage of his trial. *See Near* v. *Cunningham*, 313 F.2d 929 (4th Cir. 1963). Clearly, the rule which is in fact implemented is inapplicable under the facts of this case as the petitioner was free on bond. Under these circumstances, *Diaz* provides no basis for finding a violation of the petitioner's constitutional rights in the state proceedings.

Furthermore, under the facts and circumstances of this case as previously outlined, the trial court was completely justified in holding that the petitioner had voluntarily and wilfully absented himself from trial, thus waiving his right to be present. The evidence before the trial court was that on the morning of June 25, 1969, the petitioner shot himself in the stomach and caused himself to be hospitalized so that he would not have to attend his trial. Under these circumstances, the trial court was clearly warranted in continuing the trial in the petitioner's absence and finding that the petitioner had waived his right to be present. *See Illinois* v. *Allen*, 397 U.S. 337 (1970). Further, as previously argued in detail under Point I and reasserted here, there was nothing before the trial court to suggest that the petitioner was incapable of assisting his counsel or understanding the proceedings. Moreover, the petitioner was presumed to be sane at the time of his trial. Section 552.030 (7); *Leland* v. *Oregon*, 343 U.S. 790 (1952). There was nothing before the trial court to suggest otherwise or to suggest that the petitioner's act of shooting himself was the result of mental incompetency. Under these circumstances, the trial court provided the petitioner with a full and fair hearing on the question of the waiver of his right to be present at trial (A. 67-103) and there was no constitutional error.

CONCLUSION

For the reasons stated in the argument portion of this brief, the writ of *certiorari* was providently granted and the writ should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

Sixth Amendment to the Constitution of the United States:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

APPENDIX B

Fourteenth Amendment to the Constitution of the United States, Section 1:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

APPENDIX C

Missouri Supreme Court Rule 27.26, V.A.M.R.:

27.26 Sentence Unlawful—Motion to Vacate or Correct—Form and Scope of Motion—Notice to Prosecuting Attorney—Appointment of Counsel—Hearing—Order—Effect of Order—Appeal. A prisoner in custody under sentence and claiming a right to be released on the ground that such sentence was imposed in violation of the Constitution and laws of this State or the United States, or that the court imposing such sentence was without jurisdiction to do so, or that such sentence was in excess of the maximum sentence authorized by law or is otherwise subject to collateral attack, may file a motion at any time in the court which imposed such sentence to vacate, set aside or correct the same. The following procedure shall be applicable to motions filed pursuant to this Rule:

(a) Nature of Remedy. This Rule is intended to provide the exclusive procedure which shall be followed when a prisoner in custody seeks relief on the basis of any of the attacks on a sentence enumerated above. The motion seeking such relief shall be filed in the court where the sentence was imposed. This Rule does not suspend the rights available by habeas corpus but rather prescribes the procedure to be followed in seeking the enforcement of those rights. It includes all relief heretofore available in any court by habeas corpus when used for the purpose of seeking to vacate, set aside or correct a sentence, plus relief not available by habeas corpus. A motion filed hereunder is an independent civil action which should be separately docketed. The procedure before the trial court and on appeal is governed by the Rules of Civil Procedure insofar as applicable. No cost deposit shall be required.

(b) When Remedy May be Invoked.

(1) The provisions of this Rule may be invoked only by one in custody claiming the right to have a sentence vacated, set aside or corrected.

(2) A motion to vacate, set aside or correct a sentence cannot be maintained while an appeal from the conviction and sentence is pending or during the time within which an appeal may be perfected.

(3) A proceeding under this Rule ordinarily cannot be used as a substitute for direct appeal involving mere trial errors or as a substitute for a second appeal. Mere trial errors are to be corrected by direct appeal, but trial errors affecting constitutional rights may be raised even though the error could have been raised on appeal.

(c) Form and Sufficiency of Motion. A motion to vacate a sentence must be submitted on a form substantially in compliance with the form appended hereto. The motion shall include every ground known to the prisoner for vacating, setting aside or correcting his conviction and sentence. The prisoner shall verify the correctness of the motion, including the fact that he has recited all claims known to him.

(d) Successive Motions. The sentencing court shall not entertain a second or successive motion for relief on behalf of the prisoner where the ground presented in the subsequent application was raised and determined adversely to the applicant on the prior application or where the ground presented is new but could have been raised in the prior motion pursuant to the provisions of subsection (c) of this Rule. The burden shall be be on the prisoner to establish that any new ground raised in a second motion could not have been raised by him in the prior motion.

(e) Hearing. As soon as a motion hereunder is received by the circuit clerk, he shall notify the prosecuting attorney and transmit a copy thereof to him. If appointment of counsel is required under (h) of this Rule, such counsel shall be appointed immediately and a copy of the motion transmitted to him. Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, a prompt hearing thereon shall be held. "Prompt" means as soon as reasonably possible considering other urgent business of the court. This hearing shall be an evidentiary hearing if issues of fact are raised in the motion, and if the allegations thereof directly contradict the verity of records of the court, that issue be determined in the evidentiary hearing. All proceedings on the motion shall be recorded by the official court reporter.

(f) Burden of Proof. The prisoner has the burden of establishing his grounds for relief by a preponderance of the evidence.

(g) Presence of Prisoner. The prisoner shall be produced at any evidentiary hearing on a motion attacking a sentence where there are substantial issues of fact.

(h) Right to Counsel. If a motion presents questions of law or issues of fact, the court shall appoint counsel immediately to assist the prisoner if he is an indigent person. Counsel shall be given a reasonable time to confer with the prisoner and to amend the motion filed hereunder if desired. Counsel shall have the duty to ascertain from the prisoner whether he has included all grounds known to the prisoner as a basis for attacking the judgment and sentence and to amend the motion to include any claims not already included. If, for good cause shown, appointed counsel is permitted to withdraw, the trial court shall appoint new counsel in his stead.

(i) Judgment. The court shall make findings of fact and conclusions of law on all issues presented, whether or not a hearing is held. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was illegal or otherwise subject to collateral attack, or that there was such a denial or infringement of the constitutional rights of the prisoner as to render the judgment subject to collateral attack, the court shall vacate and set aside the judgment and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

(j) Appeal. An order sustaining or overruling a motion filed under the provisions of this Rule shall be deemed a final judgment for purposes of appeal by the prisoner or by the State. An appeal may be taken from the order entered on the motion as in a civil case as authorized by §512.020, RSMo 1959, V.A.M.S. Appellate review shall be limited to a determination of whether the findings, conclusions and judgment of the trial court are clearly erroneous.

(k) Costs. If the trial court finds that a prisoner desiring to appeal is an indigent person, it shall authorize an appeal *in forma pauperis* and furnish without cost the transcript of such proceeding for appellate review. The trial court, when the appeal is taken, shall order the official court reporter to prepare the transcript promptly. If the trial court finds adversely to a prisoner on the issue of indigency, it shall certify and transmit to the appellate court a transcript of the evidence on that issue only so as to permit review of that issue by the appellate court.

(l) Counsel on Appeal. If a prisoner desires to appeal and contends he is without means to employ counsel to perfect the appeal, the trial court, if satisfied that the

prisoner is an indigent person, shall appoint competent counsel to conduct such appeal. Such counsel may, in the discretion of the court, be the same counsel who represented the prisoner in the trial court on said motion. If, for good cause shown, appointed counsel is permitted to withdraw, the trial court shall appoint new counsel in his stead.

APPENDIX D

Section 552.010, RSMo 1969:

Mental disease or defect defined.—The terms "mental disease or defect" include congenital and traumatic mental conditions as well as disease. They do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct, whether or not such abnormality may be included under mental illness, mental disease or defect in some classifications of mental abnormality or disorder. The terms "mental disease or defect" do not include alcoholism without psychosis or drug abuse without psychosis or an abnormality manifested only by criminal sexual psychopathy as defined in section 202.700, RSMo, nor shall anything in this chapter be construed to repeal or modify the provisions of sections 202.700 to 202.770, RSMo.

APPENDIX E

Section 552.020, RSMo 1969:

552.020. Lack of mental capacity bar to trial or conviction—psychiatric examination, when, report of—commitment to hospital, when—statements of accused inadmissible, when.—1. No person who as a result of mental disease or defect lacks capacity to understand the proceedings against him or to assist in his own defense shall be tried, convicted or sentenced for the commission of an offense so long as the incapacity endures.

2. Whenever any judge or magistrate has reasonable cause to believe that the accused has a mental disease or defect excluding fitness to proceed he shall, upon his own motion or upon motion filed by the state or by or on behalf of the accused, by order of record, appoint one or more private physicians to make a psychiatric examination of the accused or shall direct the superintendent of a facility of the division of mental diseases to have the accused so examined by one or more physicians whom the superintendent shall designate. The order shall specify the time, place, and conditions under which the examination shall be conducted, and shall direct that written reports of the examination be filed with the clerk of the court. The order may include provisions for the interview of witnesses or other physicians and for a commitment of the accused to a hospital or other suitable facility for such time and under such conditions as the court deems necessary for the purpose. If the order specifies commitment to a facility of the division of mental diseases, the examining physician shall not be named in the order.

3. A report of the psychiatric examination shall include:

(1) Detailed findings;

(2) An opinion as to whether the accused has a mental disease or defect, and the duration thereof;

(3) An opinion as to whether the accused, as a result of a mental disease or defect, lacks capacity to understand the proceedings against him or to assist in his own defense;

(4) An opinion as to whether at the time of the alleged criminal conduct the accused as a result of mental disease or defect did not know or appreciate the nature, quality, or wrongfulness of his conduct or as a result of mental disease or defect was incapable of conforming his conduct to the requirements of law;

(5) A recommendation as to whether the accused should be held in custody in a suitable hospital facility for treatment pending determination by the court of the issue of mental fitness to proceed; and

(6) A recommendation as to whether the accused, if found by the court mentally fit to proceed, should be detained in such hospital facility pending further proceedings.

4. The clerk of the court shall deliver copies of the report to the prosecuting or circuit attorney and to the accused or his counsel. The report shall not be a public record or open to the public. Within five days after the filing of the report, both the accused and the state shall, upon written request, be entitled to an order granting them an examination of the accused by a physician of their own choosing and at their own expense. If such examination is ordered, a report of the examination made by the examining physician shall be furnished to the court and to the opposing party.

5. If the psychiatric report contains the recommendation that the accused should be held in custody in a suitable hospital facility pending determination of the issue of mental fitness to proceed, and if the accused is not admitted to bail, or released on other conditions, the court may order that the accused be committed to or held in a suitable hospital facility pending determination of the issue of mental fitness to proceed.

6. If neither the state nor the accused nor his counsel contests the opinion referred to in subsection 3, subdivision (3), of this section relative to fitness to proceed, the court may make a determination and finding of record on the basis of the report filed or may hold a hearing on its own motion. If any such opinion is contested the court shall hold a hearing on the issue. The report or reports may be received in evidence at any hearing on the issue but the party contesting any opinion therein relative to fitness to proceed shall have the right to summon and to cross-examine the physicians who rendered such opinion and to offer evidence upon the issue.

7. If the court determines that the accused has mental fitness to proceed and does not admit the accused to bail, or release him on other conditions, the court may order that the accused be committed to or held in a suitable hospital facility pending further proceedings. If the court determines that the accused lacks mental fitness to proceed, the proceedings against him shall be suspended and the court shall commit him to the custody of the director of the division of mental diseases for so long as the unfitness endures or until the charges or proceedings are disposed of according to law. The committed person shall be entitled to the writ of habeas corpus upon proper petition to the court which committed him. The issue of his mental fitness to proceed after such commitment may also be raised by a motion filed by the director of the division of mental diseases or by the state, alleging the mental fitness of the accused to proceed. A psychiatric report relating to the issue of the accused's mental fitness to proceed may be attached thereto. If the motion is not contested by the accused or his counsel or if after a hearing on a motion the court finds the accused mentally fit to proceed, or if he is ordered discharged from the director's custody upon

a habeas corpus hearing, the criminal proceedings shall be resumed. If, however, the prosecuting or circuit attorney determines that so much time has elapsed since the commitment of the accused that it would be unjust to resume the criminal proceeding, the court may dismiss the charge.

8. If the charges against any accused person are dismissed either by the state or by the court and if he is then in custody of the director of the division of mental diseases, he shall not be retained in such custody or in any hospital unles proper proceedings have been instituted and held as provided in sections 202.780 to 202.875, RSMo, in which case these sections and no other shall be applicable to his continued retention, hospitalization and discharge.

9. No statement made by the accused in the course of any examination or treatment pursuant to this section and no information received by any physician or other person in the course thereof, whether such examination or treatment was made with or without the consent of the accused or upon his motion or upon that of others, shall be admitted in evidence against the accused on the issue of guilt in any criminal proceeding then or thereafter pending in any court, state or federal. A finding by the court that the accused is mentally fit to proceed shall in no way prejudice the accused in a defense to the crime charged on the ground that at the time thereof he was afflicted with a mental disease or defect excluding responsibility, nor shall such finding by the court be introduced in evidence on that issue nor otherwise be brought to the notice of the jury.

(L. 1963 p. 674 §2, A. L. 1969 H. B. 29)

APPENDIX F

Section 552.030, RSMo 1969:

Mental disease or defect, not guilty plea based on—evidence—notice of defense—examination, reports confidential—statements not admissible, exception—presumption of competency—verdict contents.—1. A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he did not know or appreciate the nature, quality or wrongfulness of his conduct or was incapable of conforming his conduct to the requirements of law.

2. Evidence of mental disease or defect excluding responsibility shall not be admissible at trial of the defendant unless the defendant at the time of entering his plea to the charge pleads no guilty by reason of mental disease or defect excluding responsibility, or unless within ten days after a plea of not guilty or at such later date as the court may for good cause permit, he files a written notice of his purpose to rely on such defense. Such a plea or notice shall not deprive the defendant of other defenses. The state may accept a defense of mental disease or defect excluding responsibility, whether raised by plea or written notice, if the defendant has no other defense and files a written notice to that effect. Upon the state's acceptance of the defense of mental disease or defect excluding responsibility, the court shall proceed to order the commitment of the defendant as provided in section 552.040 in cases of persons acquitted on the ground of mental disease or defect excluding responsibility, and further proceedings shall be had regarding the confinement and release of the defendant as provided in that section.

3. Evidence that the defendant did or did not suffer from a mental disease or defect shall be admissible

(1) To prove that the defendant did or did not have a state of mind which is an element of the offense; or

(2) For the purpose of determining whether or not the defendant, if found guilty of a capital offense, shall be sentenced to death or life imprisonment.

4. Whenever the defendant has pleaded mental disease or defect excluding responsibility or has given the written notice provided in subsection 2, and such defense has not been accepted as therein provided, the judge or magistrate shall, after notice and upon motion of either the state or the defendant, by order of record, appoint one or more private physicians to make a psychiatric examination of the defendant, or shall direct the superintendent of a facility of the division of mental diseases to have the defendant so examined by one or more physicians whom the superintendent shall designate. The order shall direct that written report or reports of such examination be filed with the clerk of the court. No private physician shall be appointed unless he has consented to act. Examinations ordered hereunder shall be made at such time and place and under such conditions, including confinement to a hospital or other suitable facility and the interview of witnesses or other physicians, as the court deems proper. If the order specifies a commitment to a facility of the division of mental diseases, the examining physician or physicians shall not be named in the order. If an examination provided in section 552.020 was made and the report thereof included an opinion whether at the time of the alleged criminal conduct the accused, as a result of mental disease or defect, did not know or appreciate the nature, quality or wrongfulness of his conduct or as a result of mental disease or

defect was incapable of conforming his conduct to the requirements of law, such report may be received in evidence, and no new examination shall be required by the court unless, in the discretion of the court, another examination is necessary. Within five days after receiving a copy of such report, both the accused and the state shall, upon written request, be entitled to an order granting them an examination of the accused by a physician of his or its own choosing and at his or its expense. The clerk of the court shall deliver copies of the report or reports to the prosecuting or circuit attorney and to the accused or his counsel. All psychiatric reports required by this subsection shall conform to the requirements under subsection 3 of section 552.020 and shall not be public records or open to the public.

5. If the psychiatric report contains the recommendation that the accused should be held in custody in a suitable hospital facility pending trial, and if the accused is not admitted to bail, or released on other conditions, the court may order that the accused be committed to or held in a suitable hospital facility pending trial.

6. No statement made by the accused in the course of any such examination and no information received by any physician or other person in the course thereof, whether such examination was made with or without the consent of the accused or upon his motion or upon that of others, shall be admitted in evidence against the accused on the issue of whether he committed the act charged against him in any criminal proceeding then or thereafter pending in any court, state or federal. The statement or information shall be admissible in evidence for or against him only on the issue of his mental condition, whether or not it would otherwise be deemed to be a privileged communication. If the statement or information is admitted

for or against the accused on the issue of his mental condition, the court shall both orally at the time of its admission and later by instruction inform the jury that it must not consider such statement or information as any evidence of whether the accused committed the act charged against him.

7. All persons are presumed to be free of mental disease or defect excluding responsibility for their conduct, whether or not previously adjudicated in this or any other state to be or to have been insane, drunkards, drug addicts, sexual or social psychopaths, or otherwise mentally ill, incompetent, deranged or impaired. The issue of whether any person had a mental disease or defect excluding responsibility for his conduct is one for the jury to decide upon the introduction of substantial evidence of lack of such responsibility. But in the absence of such evidence the presumption shall be conclusive. Upon the introduction of substantial evidence of lack of such responsibility, the presumption shall not disappear and shall alone be sufficient to take that issue to the jury. The jury shall be instructed as to the existence and nature of such presumption when requested by the state and, where the issue of such responsibility is one for the jury to decide, the jury shall be told that the burden rests upon the accused to show by a preponderance or greater weight of the credible evidence that the defendant was suffering from a mental disease or defect excluding responsibility at the time of the conduct charged against him. At the request of the defense the jury shall be instructed by the court as to the contents of subsection 1 of section 552.040.

8. When the defendant is acquitted on the ground of mental disease or defect excluding responsibility, the verdict and the judgment shall so state.

APPENDIX G

Section 559.260, RSMo 1969:

Rape, punishment.—Every person who shall be convicted of rape, either by carnally and unlawfully knowing any female child under the age of sixteen years, or by forcibly ravishing any woman of the age of sixteen years or upward, shall suffer death, or be punished by imprisonment in the penitentiary for not less than two years, in the discretion of the jury.

APPENDIX H

Section 202.700, RSMo 1969:

Criminal sexual psychopath defined.—All persons suffering from a mental disorder and not insane or feebleminded, which mental disorder has existed for a period of not less than one year immediately prior to the filing of the petition provided for in section 202.710 coupled with criminal propensities to the commission of sex offenses, and who may be considered dangerous to others, are hereby declared to be "criminal sexual psychopaths".

APPENDIX I

28 U.S.C. § 1257(3) (1970):

State courts; appeal; certiorari

Final judgments or decrees rendered by the highest coutr of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

. . .

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

For purposes of this section, the term "highest court of a state" includes the District of Columbia Court of Appeals.

APPENDIX J

28 U.S.C. § 2254 (1970):

State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent therof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent

part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.